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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 212

KAUFMANN AND BAER COMPANY

and

GIMBEL BROTHERS, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

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The arguments made by the respondent in its brief in opposition to the petition for a writ of certiorari to the United States Court of Claims do not squarely meet the points made by the petitioner, and, in addition, contain certain misstatements which should be called to the attention of the Court.

1. At no point does the respondent, nor indeed in fairness could it, dispute the contention that if the LIFO regulations did not apply to the petitioner, the

90-day limitations contained therein could not be applicable to the petitioner. The respondent's sole defense to this argument is that the regulations promulgated in 1942 were applicable to users of the retail inventory method. It is clear from the record, however, that the 1942 regulations were not applicable to such retailers. Indeed, the respondent concedes that the Internal Revenue Bureau itself at the time the regulations were promulgated in 1942, and during the entire 90-day period for filing the election, adamantly took the position that the regulations did not apply to these retailers. (Resp. Br. pp. 10-11). He further concedes that the regulations made no provision for the use of price indices reflecting relative changes in market prices, and that such changes would be required to apply LIFO to the retail inventory method. (Resp. Br. p. 5). The respondent's sole basis for its incorrect statement that the 1942 regulations were applicable to the petitioner is its contention that the Tax Court, in *Hutzler Bros. Company*, 8 T. C. 14 (1947) held that the regulations when promulgated in 1942, were applicable to retailers.

It is, however, perfectly clear from the decision in *Hutzler Bros., supra,* that the court at no point held that the 1942 regulations were applicable to users of the retail inventory method. In holding that such retailers were entitled to use LIFO, the court merely looked to the statute and its legislative history. Moreover, in stating that "the adoption of appropriate details to accomplish the general purpose of applying the LIFO method to retail merchants could well be the subject of an administrative regulation [but that] . . . no such regulation has been issued"*, the court recog-

*8 T. C. 14 at p. 32.

nized that the original LIFO regulations, when promulgated in 1942, were not applicable to users of the retail inventory method.

It is therefore apparent that the regulations were not applicable to users of the retail inventory method under the provisions in force in 1942, and consequently, the 90-day limitation contained therein could not apply to the petitioner.

2. The respondent's principal answer to the petitioner's contention that if the 90-day limitation were applicable to it, the Commissioner could not nullify such time period by requiring the election to be made on forms calling for complex calculations which were issued only shortly prior to the expiration of the 90 days, is that the petitioner could have asked for an extension of time to file its election. However, in making this allegation, the respondent completely overlooks the fact that in 1943 the regulations did not provide any authority for an extension of time with respect to an election and it was only in 1944, after the expiration of the 90-day period, that the regulations were subsequently amended to give such authority. See T. D. 5391, 1944 Cum. Bull., p. 474.

3. With respect to the petitioner's contention that the Commissioner could not, within the statutory powers delegated to him, arbitrarily discriminate in the administration of the tax laws by waiving technical defects in the LIFO elections filed by a large number of petitioner's competitors while at the same time refusing to waive a technical defect, if indeed there was one, in the election filed by the petitioner, the respondent concedes that a group of retailers filed invalid elec-

tions, and that the Commissioner waived this defect. (Resp. Br. pp. 14-15). The only justification given by the respondent for this arbitrary classification is that the invalid elections filed by the petitioner's competitors prior to the time the statute first entitled them to elect LIFO gave the Commissioner adequate notice that they were going to use LIFO. But the election filed by the petitioner within a reasonable period from the time the statute first gave it the right to elect LIFO, also gave the Commissioner adequate notice of the petitioner's election to use LIFO. Since the Commissioner was given adequate notice in both cases, there is no reasonable basis, by the respondent's own standards, to justify the discrimination, and clearly there was an arbitrary, unreasonable and discriminatory classification.*

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* Since the filing of the petition for a writ of certiorari, in the instant case, the Court of Claims has decided a case which completely supports the petitioner's contention that the Commissioner may not arbitrarily discriminate between two classes of taxpayers merely on the ground that one group of taxpayers paid its tax and the other group did not. In *Connecticut Railway and Lighting Company* v. *U. S.*, ... F. Supp. ..., 4 P-H 1956 Fed. Tax. Serv. Par. 72,829 (Ct. of Cl. 1956), the taxpayer lessor had included in income both the tax on the rentals for which it was reimbursed by the lessee and the tax paid as a result of including the initial tax in the lessor's income, for which it was also reimbursed. The Commissioner in administering the law, however, had taken the position that only the direct tax on the rentals, but not the tax on the tax, was includible in rental income, and the taxpayer filed a claim for refund for the tax paid on the tax. Subsequently, the Commissioner changed his position and ruled, prospectively only, that all Federal taxes paid by a tenant on behalf of the landlord, including the tax on the tax, must be includible in the lessor's income. But, despite the fact that this ruling was not retroactive, it provided that any income taxes which had already been paid on account of the inclusion in gross income of the taxes paid by the lessee would not be refunded. The taxpayer's objection that this ruling discriminated without justification between taxpayers who had paid their taxes and those who had not, was upheld by the Court of Claims, which allowed the refund.

4. In answer to the petitioner's contention that the Commissioner was estopped from asserting that the election filed by the petitioner was invalid because the Commissioner kept himself in a position where, with the use of hindsight, he could have moved either way and could have held petitioner to its election if the price spiral had gone down, the respondent states that the Commissioner could not have held the petitioner to its election because the election was revocable and was withdrawn. It is clear, however, that the petitioner's election was irrevocable by statute and that it could not have been withdrawn without the consent of the Commissioner, which consent was never given.* It should be noted in this connection that the court below did not pass on the question as to whether the petitioner's election had been withdrawn.

5. In answer to the petitioner's contention that the decision below conflicts with *Pictorial Review Co.* v. *Helvering*, 68 F. (2d) 766 (D. C. Cir. 1934), the respondent states that there is no conflict because, in the *Pictorial* decision, the regulations in question did not apply to the taxpayer, whereas, here, the LIFO regulations promulgated in 1942 did apply to and did give the petitioner a right of election. But, as noted previously, this statement is patently incorrect and the respondent's reliance on the decision in *Hutzler Bros. Company, supra*, to support its statement that the 1942 regulations applied to retailers is wholly unfounded.

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* See *Champlin* v. *Commissioner*, 78 F. (2d) 905 (10th Cir. 1935); *Pacific National Company* v. *Welch*, 304 U. S. 191 (1938); *Lucas* v. *St. Louis National Baseball Club*, 42 F. (2d) 984 (8th Cir. 1930); *Frank W. Keeler* v. *Commissioner*, 180 F. (2d) 707 (10th Cir. 1950).

Having failed to adequately answer the contentions made by the petitioner in the petition for a writ of certiorari to the United States Court of Claims, the respondent's brief in no way detracts from the reasons set forth in said petition why this Court should grant a writ of certiorari to the United States Court of Claims.

Respectfully submitted,

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